In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-1386

BEN KLEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of five counts of willfully attempting to evade and defeat federal income taxes for the years 1966 to 1970, in violation of 26 U.S.C. 7201. He was fined $2,000 on each count and committed to the Federal Medical Center at Springfield, Missouri, pursuant to 18 U.S.C. 4208(b), for observation and study. The court of appeals affirmed (Pet. App. A 1a-10a).

The pertinent facts are as follows: During the prosecution years, petitioner was a successful practicing attorney and a member of the Colorado legislature. The evidence showed that he was careless in his handling of money, that his office was disorderly, and that his records pertaining to his law practice and other business

ventures were inadequate and disorganized. These circumstances led to the government's use of the net worth method for reconstructing the taxpayer's income for the years in question (Pet. App. A 5a-6a). See *Holland* v. *United States*, 348 U.S. 121.

1. Petitioner argues (Pet. 9-12) that the trial court erred in instructing the jury on the issue of mental competency. The facts relating to this claim are as follows. Shortly after petitioner learned that the Internal Revenue Service investigation of him would be referred to the United States Attorney for prosecution, he was hospitalized. However, on two separate subsequent occasions, petitioner was found competent to stand trial (Pet. App. A 2a).

At trial, petitioner urged that he was not legally competent at the time the offenses were committed because he was then too ill to have been capable of forming the specific intent to have attempted the willful evasion of taxes. Two psychiatrists and two psychologists testified in support of petitioner's mental incompetency claim. Their general diagnosis was that petitioner was an obsessive-compulsive, paranoid schizophrenic. In addition, 12 lay witnesses and a handwriting expert testified to petitioner's erratic behavior (Pet. App. A 2a-3a).

However, three psychiatrists and one psychologist testified as part of the government's case that although petitioner was possibly mentally ill, he was nevertheless competent at the times the offenses were committed. The testimony of several lay witnesses also supported that conclusion (Pet. App. A 3a).

At the conclusion of the trial, the trial judge instructed the jury as follows (Pet. App. A 4a-5a):

> A person is not criminally responsible for his conduct if, at the time of the conduct, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law.
>
> As applied to this case, the test for criminal responsibility on the part of the defendant means that before you may return a verdict of guilty, you must be convinced beyond a reasonable doubt that the defendant committed the act with which he is charged, if you find he did commit the act, he was mentally capable of knowing what he was doing, was mentally capable of knowing it was wrong, and was mentally capable of controlling his conduct.

Petitioner did not object to this instruction at trial, and, indeed, he affirmatively accepted all of the instructions given, without comment or objection (Tr. 2371). Nevertheless, petitioner now urges that this instruction removed the issue of criminal responsibility from the case so as to require the jury to find without further deliberation that he was mentally capable of knowing his conduct was wrong, and was mentally capable of controlling himself.

Petitioner's argument, however, ignores the first paragraph of the instruction, which explicitly admonished the jury that petitioner could not be held criminally responsible for his conduct "if, at the time of the conduct, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law." As the court of appeals correctly observed, it was made "quite clear to the jury that the question of competency was a separate and essential element of the offense charged" so that the instruction did not constitute "plain error, or grave error infringing fundamental rights" (Pet. App. A 5a).

2. Petitioner further argues (Pet. 12-15) that the psychiatrists and psychologist appointed by the trial court under 18 U.S.C. 4244 to examine his mental competency should not have been permitted to testify at trial. Because 18 U.S.C. 4244 authorized petitioner's examination "solely" for the purpose of determining his competency to stand trial, petitioner contends that the government's experts were not qualified to testify as to his competency at the time the offenses were committed. He urges that mental examinations under 18 U.S.C. 4244 are not as thorough as those designed to determine sanity for the purpose of criminal responsibility.

There is, however, nothing in 18 U.S.C. 4244 which requires a second mental examination. As the court below previously stated in *United States* v. *Julian*, 469 F.2d 371, 375-376 (C.A. 10):

> * * * § 4244 does not create an exclusive provision on the subject of criminal insanity. It undertakes to deal only with incompetency to stand trial. By treating this subject it does not thereby repeal the federal common law procedure applicable to insanity at the time of the commission of the offense.* * *
>
> There is not the slightest suggestion in the legislative history of § 4244 that Congress intended in enacting this to abolish the long-standing practice of having one examination cover both competency to stand trial and capacity to commit the crime.
>
> Numerous cases recognize that examinations pursuant to § 4244 embrace also the question of capacity to commit the offense. So, therefore, both reason and authority dictate that the dual examination is valid.

Although petitioner acknowledges (Pet. 14, n. 6) that three circuits are in accord with *Julian,* he urges (Pet. 12) that the decision below conflicts with *United States* v. *Driscoll,* 399 F.2d 135 (C.A. 2). That case dealt exclusively with the question whether the admission of the testimony of the government's medical expert "offended notions of fairness." *Id.* at 137. In holding that the testimony should not have been admitted in the particular circumstances of that case, the court in *Driscoll* noted that up to the point when the defense counsel requested the trial court to appoint a psychiatrist to examine the defendant to determine his capacity to stand trial, it was "apparent that nothing in the proceedings * * * concerned defendant's sanity when he failed to file * * * tax returns" and that defendant could not "fairly be held to have received 'notice' of a proposed dual use of his examination in the face of a specific order [of the trial court] allowing only one" (399 F.2d at 137, 138).

Unlike *Driscoll,* the record in this case does not show that the testimony of the psychiatrists and psychologist worked any unfairness upon petitioner. As the court of appeals observed, "the competency issue in all its ramifications was in the case from the outset"; petitioner's "attorneys had ample opportunity to cross-examine the Government's doctors concerning their examinations of him" (Pet. App A 4a); and at trial petitioner interposed no objection to their testimony as to his competency when the offenses were committed (Pet. App. A 4a).

At all events, *Driscoll* does not hold that, as a matter of law, psychiatrists appointed under 18 U.S.C. 4244 to examine a defendant for competency to stand trial may never testify at trial. Indeed, the court in *Driscoll* specifically declined to address the question whether the admission of such testimony "violated protective provisions of section 4244 * * *" (399 F.2d at 137). Moreover, the Second Circuit subsequently made clear in *United States* v. *Matos*, 409 F.2d 1245, 1247, that *Driscoll* is to be limited to its particular facts.

3. Petitioner further argues (Pet. 15-19) that the trial judge erroneously admitted a summary net worth chart into evidence because the revenue agent-witness characterized the chart as summarizing all of the evidence instead of just the government's evidence. Petitioner did not object to the introduction of the chart, the use of which in tax evasion cases this Court has long sanctioned. See *United States* v. *Johnson*, 319 U.S. 503; *United States* v. *Michals*, 469 F.2d 215, 217-218 (C.A. 10); *Swallow* v. *United States*, 307 F. 2d 81, 84, nn. 9 and 10 (C.A. 10), certiorari denied, 371 U.S. 950; *Hedrick* v. *United States*, 357 F. 2d 121, 123 (C.A. 10); *Rose* v. *United States*, 128 F.2d 622 (C.A. 10).

Moreover, the jury was not misled by the agent's testimony. As the court of appeals concluded, the agent (Pet. App. A 9a)—

> was put on the witness stand to summarize the Government's case, and not [to summarize] all of the evidence then in. It does not appear from the transcript that the jury could have been misled in any way concerning the summary chart. * * * The jury was instructed on the proper use of the summaries, and * * * there was adequate opportunity to cross-examine the summary witness.

4. Petitioner also argues (Pet. 19-20) that the trial court improperly admitted a certificate of assessment and a record of payments concerning his father's gift tax liability. The circumstances underlying the introduction of this evidence was as follows. In order to explain away the corrected additional and unreported net income revealed by the government's net worth analysis for each of the indictment years, 1966 to 1970, inclusive, petitioner claimed that he had received between $48,000 and $53,000 in gifts from his father during that period. The government conceded at trial that petitioner's father had made a total of $11,000 in cash gifts to petitioner during the indictment years.

In order to refute petitioner's claim that his father made additional gifts to him of between $37,000 and $42,000, the government introduced a certificate of assessment and payments showing that his father had not filed any federal gift tax returns during the entire period 1956 to 1970. If the alleged gifts had been made, petitioner's father would have been required to file gift tax returns. Thus, if petitioner's father did not comply with the gift tax return filing requirement, the jury could consider that fact in determining whether the alleged gifts had been made, since if no gifts had been made that would negate the existence of a nontaxable source of petitioner's unreported net income. On these facts, the trial court correctly admitted this evidence for the jury to consider in appraising petitioner's defense that he received gifts from his father.

5. Finally, petitioner argues (Pet. 21-22) that the admission into evidence of his 1971 return was an abuse of the trial court's discretion because the return was not relevant to any of the prosecution years. But the 1971 return was relevant because it indicated that petitioner had a lucrative law practice. The indictment years were 1966 to 1970. Because 1971 immediately followed the indictment years, the jury was entitled to consider petitioner's law practice as a likely source for his earnings as reflected in the proved net worth increases for the years at issue. Moreover, petitioner himself had introduced his 1971 books and records at the trial in order to substantiate his defense that some of the income attributed by the government to 1970 was in fact allocable to 1971 (Pet. App. A 7a-8a).[1]

The 1971 return was thus properly admitted in evidence. As the court of appeals noted (Pet. App. A 8a), "[r]eturns for years subsequent to those under indictment are not per se improper evidence." See *Lisansky* v. *United States*, 31 F.2d 846, 851 (C.A. 4).

Nothing in either *United States* v. *Baum*, 435 F.2d 1197, 1202-1203 (C.A. 7), certiorari denied, 402 U.S. 907, or *United States* v. *Stoehr*, 196 F.2d 276 (C.A. 3), certiorari denied, 344 U.S. 825 (Pet. 21), is to the con-

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[1]Petitioner's 1971 return reported a tax liability of $23,269. His returns for all of the indictment years reported a total tax liability of only $8,549.71 (Pet. App. A 8a). It was proper for the jury to consider the dramatic contrast between the tax shown for a period only one year after the last of the prosecution years and that shown for the prosecution years.

trary. In *Baum*, an attorney was charged with conspiring to evade the tax liabilities of third-party clients for the years 1956 to 1960. The trial judge excluded, as irrelevant to the issue of a conspiracy in the prior years, the defendant's proffer of his clients' tax returns for years subsequent to the indictment years. In *Stoehr*, the court held that the trial court had properly excluded defendant's proffer of evidence that he had overpaid his taxes for 1946, where the indictment charged that he willfully attempted the evasion of taxes for 1943, 1944 and 1945. Just as in *Baum* and *Stoehr*, the trial court's rulings here were within the permissible exercise of its discretion.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.